

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 12 of 2007

BETWEEN:

FRANKLYN FRANCIS

Employee

and

ST. JOHN'S DEVELOPMENT CORPORATION LIMITED

Employer

Before:

The Hon. Philip A. Pilgrim

President

The Hon. Genevieve L. I. Benjamin

Member

The Hon. Dr. Hayden Thomas

Member

Appearances:

Mr. Egbert Joseph - of Hotel Management Association

Mr. Leon Symister - Attorney-at-Law for the Employer

2009: March 25

May 21

JUDGMENT

PILGRIM P.:

The Facts

[1] St. John's Development Corporation is an entity which is established by the Government of Antigua and Barbuda. It has responsibility for the management of different agencies. These include Heritage Quay,

the Multi-Purpose Cultural Centre, the Public Market Complex, and it's Warehouse. It shall sometimes be afterwards referred to as "*the Corporation or the Employer.*"

- [2] The Employer employs various workers. They provide services at the agencies referred to above.
- [3] Mr. Franklyn Francis commenced working for the Corporation on January 01, 1991. He was employed as a plumber at the Heritage Quay location.
- [4] By letter dated April 25, 2005 Mr. Francis was transferred to the Multi-Purpose Cultural Centre. He indicated that he was not pleased with the transfer. His Junior Supervisor was Mr. Sylvester Henry.
- [5] In May 2006, the Employee requested from the Employer to be considered for a voluntary separation package. It was refused. According to Mr. Francis he "*was not displeased*" with the refusal.
- [6] At the Multi-Purpose Cultural Centre he "*went into a different culture than at Heritage Quay. At Heritage Quay, (he) could have missed a day from work, do not call to the Employer to explain why, but on the following day (he) would explain (his) absence to the supervisor and he would say it is not a problem (and) it would be made up. At the Multi-Purpose Cultural Centre (he) could not do this.*"

- [7] In answer to Mr. Egbert Joseph of Hotel Management Association on the Employee's behalf Mr. Francis stated *inter alia* as follows:

“On October 26, 2006 I did not go to work. I did not call to say why I was absent. On October 27, 2006 the next day I told Mr. Abraham of an apology. I was not sick. I was doing something and I did not finish it. I never had a good relationship with Mr. Henry.”

- [8] Mr. Fernando Abraham is the Manager of the Multi-Purpose Cultural Centre. He wrote Mr. Francis a letter dated October 30, 2006. This was admitted as “FF-3”. With regard to Mr. Francis' absence from work without a notification to the office, Mr. Abraham wrote *inter alia* as follows:

“This type of behaviour is unacceptable. Any repetition of this kind of behaviour will result in strong disciplinary action being taken against you.”

- [9] Ms. Victorine Bernadette Emmanuel gave evidence. She is the Personnel Officer of the St. John's Development Corporation. She is stationed at Heritage Quay. She has been employed by the Corporation from 1997.

- [10] Ms. Emmanuel testified that she is familiar with the practice of absenteeism at Heritage Quay. At Heritage Quay a practice has never developed which allows an employee to be absent for one day and on the following day the employee ***“can make up with his supervisor.”***

- [11] According to Ms. Emmanuel the policy is that the employee is given up until 11:00 a.m. to notify the employer of the reason for his absence.
- [12] According to the Agreement between the Corporation and the Antigua Trades & Labour Union for the period May 01, 2004 to April 30, 2007, the working hours for all employees at the Multi-Purpose Cultural Centre were 7:00 a.m. to 3:00 p.m. and 3:00 p.m. to 11:00 p.m.
- [13] On November 06, 2006 Mr. Francis stated that he sought medical attention from Dr. Edwards. According to him, he called the office at the Multi-Purpose Cultural Centre about 7:05 a.m. No one answered the telephone. He telephoned the messenger one Annmarie John. He informed her of his visit to the doctor. He further told Ms. John to inform his supervisor, presumably Mr. Sylvester Henry.
- [14] Ms. Annmarie John's Witness Statement was filed on December 28, 2008. At **paragraphs [5 & 6]** she confirms Mr. Francis' outline of the relevant events at **paragraph [13]** of this judgment.
- [15] On November 06, 2006 Mr. Francis was scheduled to work from 7:00 a.m. to 3:00 p.m. He arrived for duty at work at or about 9:20 a.m. The matter of his lateness was referred to the Personnel Officer for an investigation to be made.
- [16] On or about November 06, 2006 a meeting took place to discuss Mr. Francis' late arrival at work on November 06, 2006. In attendance were Mr. Francis, his trade union representative and representatives of

the Employer. After some discussion, Mr. Francis was suspended for three weeks from November 06, 2006 until November 24, 2006 without pay.

[17] By a letter dated November 10, 2006 (FF-1) the Employer confirmed Mr. Francis' suspension. He was warned that ***“Any further infraction will result in termination of your employment.”***

[18] On Saturday December 09, 2006 Mr. Henry instructed Mr. Francis to attend to a plumbing problem at the Public Market. Mr. Francis testified that he obeyed Mr. Henry's instruction. He went to the Public Market between 8:15 a.m. and 8:30 a.m. He worked between one (1) hour and one and a half hours. He returned to the Multi-Purpose Cultural Centre about 9:45 a.m.

[19] Mr. Henry gave conflicting responses to a determination of the matter of Mr. Francis' completion of the work at the Public Market. In response to Mr. Symister Attorney-at-Law for the Employer he stated *inter alia* as follows:

“the problem wasn't fixed.”

In answer to Mr. Joseph the Employee's Representative he stated *inter alia* as follows:

“I can't recall who eventually fixed the problem or if it was fixed. I can't recall if I was called again about it.”

- [20] Mr. Francis was absent from work on December 22, 2006. He claimed that he was entitled to this day as his shopping day for Christmas.
- [21] The grant of a shopping day for Christmas is at the discretion of the Employer. An employee must seek his immediate supervisor's permission to take an approved shopping day.
- [22] Mr. Henry testified that Mr. Francis never requested a shopping day for the 2006 Christmas. Other persons received permission from him with respect to their Christmas 2006 shopping days. The employee is requested to make a verbal request to him.
- [23] Mr. Francis' evidence with regard to the Christmas 2006 shopping day is conflicting. In answer to Mr. Joseph he stated *inter alia* as follows:

“I wrote down my shopping day and gave it to Ms. Paige.

I don't know if she approved it. Ms Paige told me that

Mr. Henry, the Junior Supervisor said that I cannot get the

22nd December 2006. I spoke with Mr. Lionel Nedwell, the

Assistant Personnel Officer. He told me to verify it with

Mr. Sylvester Henry. Mr. Henry never told me yes or no.”

[24] In answer to Mr. Symister, Mr. Francis stated *inter alia* as follows:

“For the shopping day, I must get approval. I wrote it down. Mr. Nedwell told me “no problem” and to take the shopping day.”

[25] The incidents referred to above at **[paragraphs 7, 13, 18 and 22]** were determined by this Court to be the relevant matters of substance raised by the Employer with respect to the Employee.

[26] Other matters were highlighted by the Employer. These included an incident of Wednesday December 17, 2006 when the Employer stated that Mr. Francis left the Multi-Purpose Cultural Centre at 12:25 p.m. and did not return to work. On Wednesday December 26, 2006 the Employer stated that Mr. Francis left for lunch at 1:30 p.m. and returned at 2:50 p.m.

[27] Although the matters referred to at **[paragraph 26]** could have been verified by the Employer’s documents, none were produced.

[28] By a letter dated January 04, 2007 the Corporation dismissed the Employee ***“effective immediately.”*** It paid him ***“28 vacation days for the period 2006-2007--”*** This letter of dismissal was admitted and marked ***“FF-1.”***

MITIGATION EFFORTS

[29] After his dismissal, Mr. Francis completed application forms seeking employment from Galley Bay Resort, Royal Antigua and St. James

Club. Whilst working at the Multi-Purpose Cultural Centre, Mr. Francis was also employed for an unspecified period of part-time employment at Carlisle Bay for which he earned \$335.00 per week. He continued doing this after his dismissal.

- [30] In June 2007 he obtained full time employment at St. James Club. His wages are \$520.00 per week. He also earns income from the performance of private plumbing work.

LEGAL PROCEEDINGS

- [31] On November 15, 2007 a Reference was filed in this Court on behalf of the Employer.
- [32] The Employee's Memorandum was filed on November 26, 2007. The Employer's Memorandum was filed on January 14, 2008.
- [33] The Witness Statements of Mr. Francis and Ms. John for the Employee were filed on January 18, 2008 and January 28, 2009 respectively.

THE ISSUES

- [34] The issues which arise to be determined by this Court are as follows:

- (i) **Did the Employee's behaviour complained of by the Employer at [paragraphs 7, 13, 18 and 22] of this judgment**

merit summary dismissal in accordance with Section C58 (1) (a) and (2) of the Antigua and Barbuda Labour Code?

- (ii) If the Employee's behaviour did not amount to misconduct which justified the Employer to dismiss the Employee, what is the measure of damages to which he may be entitled?**

EMPLOYEE'S WRITTEN SUBMISSIONS

[35] Written Submissions were filed by Mr. Joseph on April 15, 2009. In summary, Mr. Joseph submits that the dismissal of Mr. Francis was unfair. No cases were cited.

EMPLOYER'S WRITTEN SUBMISSIONS

[36] Mr. Symister, Attorney-at-Law filed his Written Submissions on April 21, 2009. He submits that the employee's dismissal was fair in accordance with C58 (1) (a) of the Antigua and Barbuda Labour Code. No cases were cited.

THE LAW

[37] An employee is entitled not to be dismissed without just cause if his probationary period with an employer has been concluded. See Section C56 of the Labour Code.

[38] C58 (1) (a) and (2) of the Labour Code read as follows:

“C58 (1) A dismissal shall not be unfair if the reason assigned by the employer therefor

(a) relates to misconduct of the employee on the job, within the limitations of section C 59 (1) and (2);

(a);

(b);

(c);

(d);

Provided, however, that there is a factual basis for the assigned reason.

(2) The test, generally, for deciding whether or not a dismissal was unfair is whether or not, under the circumstances, the employer acted unreasonably or reasonably but, even though the employer acted reasonably, if he is mistaken as to the factual basis for the dismissal, the reasonableness of the dismissal shall be no defence, and the test shall be whether the actual circumstances which existed, if known to the employer, would have reasonably led to the employee's dismissal.”

[39] The nature and extent of the misconduct referred to in Section C58 (1) (a) of the Labour Code is defined in Section

C59 (1) (a) for the purposes of the facts before the Court.
That Section states as follows:

C59 (1) (a) of the Labour Code reads as follows:

“C 59. (1) An employer may terminate the employment of an employee where the employee has been guilty of misconduct or in relation to his employment so serious that the employer cannot reasonably be expected to take any course other than termination. Such misconduct includes, but is not limited to situations in which the employee has
(a) conducted himself in such a manner as to clearly demonstrate that the employment relationship cannot reasonably be expected to continue;
(b)
(c)

[40] In **Robert Emmanuel and Bank of Antigua Ltd. Ref. No. 12 of 1992** Mr. H. S. R. Moe, the then President of this Court made reference to the former Section C. 61 (1) and (2) of the Labour Code (now Section 59 (1) and (2)). He stated *inter alia* as follows:

“What this Section does is simply to direct the employer about the sort of circumstances when he may dismiss. In other words, they are not the only set of circumstances when he may dismiss for

misconduct. It is to be noted that the Section uses the word “may” which clearly shows that it is discretionary and not obligatory.

Dismissals relating to misconduct cover a multitude of sins and what this Court has to determine is whether the circumstances were such that would reasonably lead a reasonable employer to dismiss.”

- [41] If the misconduct is at great variance with the employee’s contract of service then his actions may result in being dismissed for just cause. In matters of this nature, each case depends on its own facts.

THE FIRST ISSUE

Did the Employee’s behaviour complained of by the Employer at [paragraphs 7, 13, 18 and 22] of this judgment merit summary dismissal in accordance with Section C58 (1) (a) and (2) of the Antigua and Barbuda Labour Code?

- [42] What were the facts which the Employer knew prior to its dismissal of the Employee? What were the reasons given by the Employer for the Employee’s dismissal? The reasons adumbrated by the Employer for the Employee’s dismissal are to be found in the letter of dismissal (Exhibit FF-1”) and in the oral evidence of Mr. Sylvester Henry and Ms. Victorine Bernadette Emmanuel.

[43] The first matter of substance related to Mr. Francis' absence from work on October 26, 2006. On this day he did not notify his Employer of any reason for his absence. Mr. Francis at this time was employed by the Corporation for more than fifteen (15) years.

[44] The Collective Agreement between the two (2) parties makes reference at Clause 19 to various forms of Leave of Absences under certain specific circumstances. They include (a) sick leave (b) compassionate leave (c) Jury leave (d) leave for union business, and (e) time off in exceptional circumstances.

[45] No provision existed in the Collective Agreement for Mr. Francis to take one day off from work unless it was proscribed by one of the categories referred to at **Clause [19]** thereof.

[46] Moreover, it is a good practice for an employee to inform the employer within a reasonable time on a day which the employee intends not to report for duty. This allows the employer to put alternative plans in place if the skills of the employee are required to execute certain tasks.

[47] I accept the evidence of Ms. Emmanuel that an employee is required to inform the Employer prior to 11:00 a.m on the

day when he shall be absent of his request to be excused from performing his duties on that day. That Mr. Francis did not avail himself of the opportunity to inform the Employer that he would be absent from the performance of his duties on October 26, 2006 is deplorable. His actions (or lack thereof) robbed the Employer of his services without any reason whatsoever.

[48] The second matter related to Mr. Francis' absence from work until his arrival at 9:20 a.m. on November 06, 2006. Ms. Emmanuel gave evidence for the Corporation. She stated *inter alia* in her Witness Summary that ***“Mr. Francis responded that he was trying to call the Office and the phone rang out and he had something important to do.”***

[49] Mr. Francis gave evidence. He stated *inter alia* that he communicated with an employee of the Corporation his desire to obtain medical treatment. The name of the person to whom he spoke in this regard is Ms. Annmarie John. She is employed by the Corporation. She gave evidence in this Court. She filed a Witness Statement. She corroborated Mr. Francis' account of the events of November 06, 2006. His effort in this regard is to be commended. It appears that the Corporation suspended him for this ***“infraction”*** without having the benefit of hearing from Ms. John. This was unfortunate.

- [50] The third matter related to the events of December 09, 2006. These are referred to at **[paragraphs 18 & 19]** of this judgment. Mr. Henry for the Employer did not convince this Court that he was ever aware of (a) the nature of the job to be performed by Mr. Francis and (b) whether he was certain that the problem was ever rectified.
- [51] However, Mr. Francis had been employed by the Corporation for 15 years. If indeed Mr. Francis did perform the work which Mr. Henry had assigned him to do, then it was his duty and responsibility to report the nature and progress of such work upon its completion to Mr. Henry. Such action would have made Mr. Henry feel sure that Mr. Francis had in fact completed his assignment.
- [52] The fourth area of concern for the Employer were the events of December 22, 2006. There is clear evidence that Mr. Francis did not submit his request for a shopping day to Mr. Henry. In addition, he did not obtain permission from Mr. Henry his immediate supervisor.
- [53] Mr. Francis' evidence is that **"Mr. Henry, the Junior Supervisor said that I cannot get the 22nd December 2006,"** as his shopping day. If Mr. Francis could not obtain December 22, 2006 as his shopping day, it was his responsibility to obtain some other suitable day from the

Employer. He was therefore wrong in these circumstances to persist in taking December 22, 2006 as his shopping day.

[54] Having listened to the evidence of Mr. Francis and Mr. Henry, it does appear that a less than a cordial working relationship existed between the two parties. The events which occurred between them may have inadvertently led the Employer into believing that it had good grounds for summarily dismissing the Employee.

[55] This Court concludes that the facts of this case do not rank it as one which evidences misconduct of such a serious nature that the Employer cannot reasonably be expected to take any course other than termination. In the circumstances of this case, we hold that the Employee was unfairly dismissed.

[56] This Court had the benefit of observing Mr. Francis as he gave his evidence. His actions subsequent to his request to obtain a voluntary separation package from the Employer clearly demonstrate in three specific instances that the reasons for the Employer's dismissal of him were attributable to those actions. He is therefore not ***"without sin."*** -See Maundy P in **Alexander Hughes and Antigua Brewery Ltd Ref. No. 35 of 2002 at [paragraph 24]**.

These circumstances must be taken into consideration to substantially lessen the award to which he would have been otherwise entitled had these events not occurred. This Court

shall reduce Mr. Francis' award to the extent of 75 per centum.

THE SECOND ISSUE

If the Employee's behaviour did not amount to misconduct which justified the Employer to dismiss the Employee, what is the measure of damages to which he may be entitled?

[57] The Award

An employee who is held to be unfairly dismissed is entitled to awards under established headings.

a) Basic Award

The award under this heading is similar to that of severance. The employee worked for 16 years. His last monthly salary was \$2,460.48. His entitlement under this heading is \$2,460.48 x 16 or \$39,367.68.

b) Immediate Loss

The Employee continued to earn income at the rate of \$335.00 per week. A loss of \$232.80 per week for 16 weeks would suffice. The award is \$3,724.80.

c) Manner of Dismissal

No award is made under this heading.

d) **Future Loss**

The Employee's loss is \$232.80 per week. He also earns a sum from private plumbing work. If the above figure is multiplied by 12 weeks, the award would be \$2,793.60. From this must be subtracted 10 per centum reduction as he receives a lump sum payment. The figure is \$2,514.24.

e) **Other Award - Notice Pay**

The Employee is entitled to one month's pay or \$2,460.48.

[58] The Employee is ordinarily entitled to \$48,067.20. From this sum a 75 per centum reduction must be subtracted. The sum of \$12,016.80 shall be paid by the Employer to the Employee on or before June 30, 2009.

[59] There shall be no order as to costs.

Dated this 21st day of May, 2009


PHILIP A. PILGRIM
President

I agree


GENEVIEVE L. I. BENJAMIN
Member

I also agree


DR. HAYDEN THOMAS
Member

